Supreme Court, U. S.
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IN THE

Supreme Court of the United States

No. 77-556

EAST END YACHT CLUB, INC.,
Petitioner,

v.

BUCKLEY BROS., INC.,
Respondent.

Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit With Supplemental Appendix.

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Buckley Bros., Inc., your respondent, hereby opposes petitioner's prayer for writ of certiorari filed on October 14, 1977 and requests that it be denied.

Opinion Below.

The United States Court of Appeals for the Second Circuit in an unreported opinion affirmed the order of the District Court based upon its opinion reported at 421 F. Supp. 1275—Appendix A and A-1. Submitted by

way of supplement to the United States Court of Appeals was an appendix setting forth the claims of the sole remaining plaintiff which is annexed hereto (SA1-SA7).

Questions Presented.

1. Does the petition present any special and important reasons for review by this Court?

2. Do the facts and law in the instant case conflict with any decisions in other circuits or decisions of this Court?

3. Is the determination made by the District Court of such finality that it warrants review by this Court?

Statement of Case.

In view of the fact that events occurring subsequent to the decision of the District Court have changed the complexion of this case considerably, the facts are set forth as they now apply.

On June 15, 1970, there was a discharge of oil onto Johnson's Creek. The oil spill came from the overflow of Buckley's No. 7 tank through a rupture in a six-inch cast iron plug on the tank. The overflow resulted from the failure of a Buckley workman to properly align a valve located on a pipe through which a cargo vessel "Overseas Audrey" was pumping No. 2 oil.

The valve on the pipe in question was located approximately one quarter of a mile away from the vessel, and the work of discharging the oil and alignment of the valves was being performed by and in control of Buckley Bros. employees. The power source for the discharge of the oil into the pipes came from pumps on the vessel "Overseas Audrey" under charter to defendant, Shell Oil

Company. As soon as the crew members of the vessel were advised of the spill from tank No. 7, all pumping operations were stopped. Approximately 655,000 gallons of No. 2 oil were spilled.

In accordance with these facts, the District Court determined as a matter of law that under applicable maritime negligence principles the evidence submitted permitted no inference of control which might conceivably create any duty which was breached by Shell Oil Company, and by memorandum of decision dated September 2, 1974, granted summary judgment in its favor. Following a denial of a motion to re-argue the summary judgment ruling, the plaintiffs appealed to the Court of Appeals for the Second Circuit. *Parsell, et al. v. Shell Oil Company, et al.* (2nd Cir., Docket No. 75-7626). That appeal was subsequently discontinued without prejudice by stipulation dated May 3, 1976 leaving as the remaining and sole defendant, Buckley Bros., Inc.

In light of the complaint that the claim for relief was one based upon a maritime tort and the references made in the plaintiffs' pleadings that they had "a good, valid and meritorious admiralty action," Buckley Bros., Inc. moved to dismiss the jury claim on the basis that federal jursdiction, being based upon admiralty and maritime claims (Title 28 U.S.C. §1333) did not give the plaintiffs a right to trial by jury. This motion was granted by Judge Jon O. Newman on October 19, 1976 and leave to appeal from this order was granted pursuant to 28 U. S. C. §1292 (b) on January 28, 1977.

Prior to the appeal being heard by the Court of Appeals, all of the claims of the plaintiffs, save those of East End Yacht Club, were settled and resolved. Claims disposed of were those asserting damage to shellfish beds in Bridgeport Harbor, damage to young oysters being raised in rafts in the Housatonic River and like matters.

The remaining claims of East End Yacht Club are somewhat different. The Club makes claim for the replacement and repair of its docks, damages to an aeration system, loss of profit derived from its annual picnic, and a variety of other miscellaneous items including the fact that oil was tracked into the Clubhouse proper (SA2). These claims are far different from the claims made by the other plaintiffs and have little or nothing to do with "aquatic purity" or the navigable waterways.

Reasons for Denying Writ.

POINT I.

There are no special or important reasons for review.

This Court should not and will not grant a petition for writ of certiorari unless there are presented special and important reasons therefor. Rule 19—Rules of the Supreme Court of the United States. The instant case, as it now stands, presents a variety of miscellaneous claims most of which are simple, common law nuisance claims and some of which are not actionable at all. As such, the case as it presently stands does not present to this Court any issues of "deep federal concern," "federal interest," or "appropriate federal remedies" for such injuries. Indeed, in its present posture, this case deals with a simple land based tort alleging damage to property affixed to the shore with no relationship to traditional maritime activities. *Executive Jet Aviation v. Cleveland,* 409 U. S. 249 (1972). As such, there is considerable question as to whether there is any reasonable basis for any federal jurisdiction over the remaining claims. In addition, it is pointed out that East End Yacht Club has been credited $55,865 for losses already sustained which amounts to substantially all the damages to which

it may be entitled (SA2). Those large items claiming loss of use are clearly not actionable under any jurisdictional theory (SA3). See: *Oppen v. Aetna Insurance Co.,* 485 F. 2d 252 (9th Cir. 1973).

In sum, this case in its present posture does not properly present any of the issues raised by the petitioner and, indeed, does not even reflect what the District Court characterized as "important questions concerning the availability of federal jurisdiction for water pollution claims." This is so as there no longer exist any claim for water pollution. The remaining damages, insofar as they are actionable, relate solely to property damage to shore side equipment.

POINT II.

There is no conflict between this case and any other decisions in the Circuits or this Court.

The petitioner attempts to argue that the holding of the District Court that Title 33 U. S. C §407 does not create a private cause of action conflicts with other cases which have purportedly analyzed the same question. However, the cases referred to by the petitioner were all determined prior to *Cort v. Ash,* 422 U. S. 66 (1975), which held as follows:

> "In determining whether a private remedy is implicit in a statute not expressly providing one, several factors are relevant. First, is the plaintiff 'one of the class for whose special benefit the statute was enacted,'—that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff?

> And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?"

East End Yacht Club is not one of a class for whose special benefit this statute was enacted. Nor is there any indication that Congress has authorized private Attorney Generals to enforce the statutory scheme. It is apparent that the plaintiff has ample remedies whether it be under the state common law of nuisance or the oar of federal admiralty jurisdiction. Furthermore, this case does not involve the same matters of concern raised in the cases cited by the petitioner. There is clearly no navigation impeding deposit involved in this case and it is difficult to understand how the loss of profit from the annual picnic can be construed to fall within any federal interest in water pollution. Finally, it must be remembered that *Illinois v. City of Milwaukee, Wisconsin,* 406 U. S. 91 (1972), relied upon by petitioner, was a case involving original jurisdiction. That case does not suggest that a new federal cause of action should inure to a plaintiff of the type herein making complaints of oil being tracked around its club room floor (SA6).

In sum, there is no conflict between the instant case on the facts as they now stand and any other factually similar case in any other jurisdiction.

POINT III.

The interlocutory order entered in this case should not be heard by this Court.

While the Court of Appeals for the Second Circuit certified this case as an interlocutory appeal in accordance with 28 U. S. C. §1292(b), it did so prior to the great

bulk of the claims being settled. Certainly, it is doubtful whether the District Court would now determine that the case presently involves controlling questions of law on which there is a substantial ground for difference of opinion. As such, the interlocutory order should not be heard by this Court.

Quite apart from the fact that this is an interlocutory order, it is pointed out that the plaintiffs elected admiralty jurisdiction to try their case in the first place, and where a martime claim is relied upon and identified as such, there is no right to trial by jury. *Romero v. Bethlehem,* 368 F. Supp. 890, aff. 515 F. 2d 1249 (5th Cir. 1974); *Americana of Puerto Rico, Inc. v. Transocean Tankers Corp.,* 317 F. Supp. 798 (D.P.R. 1969). As such, the issues raised in the petition are wholly hypothetical.

Conclusion.

For the foregoing reasons, it is respectfully requested that the petition be denied.

THE DEFENDANT,
By Dion W. Moore,
Pullman, Comley, Bradley & Reeves,
855 Main Street,
Bridgeport, Connecticut 06604

Supplemental Appendix.

IN THE

SUPREME COURT OF THE UNITED STATES,

October Term, 1977.

No. .

EAST END YACHT CLUB, Inc.,

Petitioner,

v.

BUCKLEY BROS., Inc.,

Respondent.

Itemization of Damages of East End Yacht Club, Inc. **SA2**

Portions of Deposition of Pasquale Petrino **SA5**

East End Yacht Club
Itemized Statement of Special Damages.

1.	Bradley—Upson: For replacement and repair of Club Floats and other damage	41,980.00
2.	Federal Electric: For dock rewiring (quote from County Electric $15,660.00)	13,885.00
		55,865.00
	Credits for amounts Travelers paid to Bradley—Upson and Federal Electric or for them:	55,865.00
3.	Clean bulkhead	1,600.00
4.	Launching ramp, 92′ x 44′ x 2″ depth (Club member labor, trap rock and road mix)—excavate and install (D'addario quote)	6,100.00
5.	Incidental costs to clean up	1,000.00
6.	Emergency lighting during clean up to protect marina	500.00
7.	Cost of installing master aeration system and cost of equipment by club members, equipment purchased from Scales Engineering, Quote by Scales Engineering Co. for whole job	20,000.00
8.	Loss of potential revenue for Season, 5 months @$1,000.00 per month	5,000.00
9.	Loss of Picnic profit, including bar	800.00

10.	Cancelled boat reservations for Strawberry Festival, June, 1970, 18 boats @$10.00 per night, 2 or 3 nights	500.00
11.	Lost use of club members' boats during period of time restricted from boarding craft per order of Coast Guard, 180 boats docked at Club, charter rates $300.00 for 28′ craft and $150.00 for outboard runabout, average cost for two weeks	40,000.00
12.	Additional time lost awaiting opening of Johnson's Creek and loss of use while in for repairs, two to six weeks	80,000.00
13.	Additional costs for labor which would have otherwise been provided by Club members, see production 5 A 1	

(a) Electrical—$6,700.00

(b) Watchman's pay—$264.00

(c) Pick up labor—$100.00

(d) Reiner Construction (finish work) —$2,000.00

(e) Edward Simons (additional plumbing)—$3,500.00

(f) Al Karr (extra flashing)—$85.00

(g) Oakland Tile (laying floor)—$917.80

(h) Mr. Kwoka (cool box)—$354.00

(i) J. J. Fence (fire escape)—$1,000.00

(j) Fire Escape Fabrication (not being able to weld due to oil)—$300.00

(k) Master Tile Co. (ceramic tile)—$560.00

(l) Vito DeMartino (outside trim paint)—$370.00

(m) J. J. Fence (outside welding railings)—$230.00

(n) Charles Sheet Metal (ducts)—$600.00

(o) Loss of voluntary help to construct new building in addition to above—$4,000.00

	Subtotal—	20,980.80
14.	County Electric bid 15,660.00 less paid by Travellers 13,885.00 due	1,985.00
15.	Repaint docks, ramps, ships, etc. by members (Quote from Washington Decorator 5A2)	3,500.00
16.	Labor for moving and shifting 200+ boats, trailers and dock cranes to facilitate removal of oil and later to refit docks, approximately 1200 man hours @$5.00 an hr.	6,000.00
17.	Clean launching ramp	2,000.00
Total		$245,830.80

Portions of Deposition of Pasquale Petrino.

Q. Was there any change in your income from 1968 to 1969? A. No. I believe it was about stable.

Q. Did it change at all in 1970? A. '70 is a hard year because of the new building.

Q. I'm talking about your income now, not your expenditures. A. No. Because of the new building it's a hard year because we did expend so much more with that new building going up, and I am not certain just what the figures are. We don't have them in our hands just yet. They will be delivered to us in March. That's our annual meeting, and all our figures are given from the CPA.

Q. Did your income insofar as rental of boat slips, lockers—has that changed in any manner? A. No.

Q. Was your restaurant in 1970 still being operated on a concession basis? A. In 1970 at times, yes. We had a very bad year for the restaurant. We couldn't keep people there. Once the oil spill came down nobody wanted to eat.

• • •

Q. Were any repairs made to these docks subsequent to the finding of oil? A. Repairs made after the spill?

Q. To the docks, yes. A. Yes.

Q. When was that? A. Between two and three weeks after the spill.

Q. What was done in terms of repairs? A. All the docks were taken out of the water and repaired, taken apart and all new styrofoam was placed in.

Q. Was any of the planking renewed or new planking put in? A. The only time new planking would have been put in is if it was broken by a contractor or split when they hoisted it.

Q. Do you have all the bills involved in having all this repair work done? A. Yes.

Q. When were the docks completely repaired? A. It was well in September before the job was finished.

Q. They are presently in good order and repair? A. Yes.

• • •

Q. What other damage did you sustain? A. What other damage, physical?

Q. Yes, physical, to the physical aspects of your property. A. The whole thing was soaked up in oil. The shoreline, ramp, what not. Oil was tracked into the club. We had damages because of the spill itself, the contractors wouldn't continue on. They were scared to continue on because the Fire Department was there and watching everybody.

The welding that was tying in portions of our backwalk had to stop. The carpenters couldn't stand the oil, he wouldn't stay around. The mason wouldn't be doing much work there.

Q. How long after the spill did these people refuse to work? A. They came back a couple of weeks, three or four weeks after the spill, when this cleared up a bit. Well, we lost all of our volunteer help that we had counted on with the construction of this building. We had to subcontract—we were the general contractor. We did all the subcontracting work, this particular building.

Q. Did all building activities, in building this building, stop? A. For well into three weeks, at least three weeks, all of it stopped.

• • •

Q. Did this oil spill cause any damage to the aerator system that was in there? A. It might have damaged the lines somewhat. It softened up some of the plastic. But it's impossible to run them without power. You need electricity to run these compressors.

We did not have electricity.

Q. You didn't have electricity on the docks? A. We didn't have it since the time of the spill.

• • •

Q. Where on the docks are the duplex waterproof receptacles located? A. On 4x4 posts.

Q. How far above the planking of the dock is that located? A. Around five feet.

Q. What damage was caused to these duplex receptacles by the oil? A. Because the docks had to be taken out to be rebuilt or new styrofoam put in, the electrical inspector claimed that there is now a revision in the marina codes, and once your electrical lines are dismantled, they will no longer be allowed to be put up.